

**APR 19 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

NATURAL RESOURCES DEFENSE  
COUNCIL; CALIFORNIA TROUT;  
BAYKEEPER & ITS DELTAKEEPER  
CHAPTER; FRIENDS OF THE RIVER;  
THE BAY INSTITUTE, all non-profit  
organizations,

Plaintiffs - Appellees,

STATE WATER CONTRACTORS,

Intervenor - Appellant,

v.

GALE A. NORTON, in her official  
capacity as Secretary of the Interior;  
STEVEN A. WILLIAMS, in his official  
capacity as Director, U.S. Fish & Wildlife  
Service,

Defendants.

No. 05-16581

D.C. No. CV-05-00690-CW

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Northern District of California  
Claudia Wilken, District Judge, Presiding

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited  
to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted April 4, 2006  
San Francisco, California

Before: FERGUSON, TROTT, and KLEINFELD, Circuit Judges.

State Water Contractors (“Contractors”) moved to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a) in a lawsuit filed by Natural Resources Defense Council, California Trout, Baykeeper and its Deltakeeper Chapter, Friends of the River and The Bay Institute, challenging the issuance of a biological opinion addressing proposed changes in the operation of state and federal water storage and diversion projects. The district court denied the motion. The Contractors appeal.

The denial of a motion for intervention as a matter of right is reviewed de novo. United States v. Alisal Water Corp., 370 F.3d 915, 918-19 (9th Cir. 2004). Thus, we must consider the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered. Ness v. Comm’r, 954 F.2d 1495, 1497 (9th Cir. 1992). Consequently, given the standard of review, the district court order, no matter how well-reasoned and well-written, cannot be given deference; we consider the matter independent of the district court’s order. See Agyeman v. INS, 296 F.3d 871, 876 (9th Cir. 2002).

Federal Rule of Civil Procedure 24(a) allows for a party to intervene as a matter of right when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. The rule is to be construed liberally in favor of the party seeking intervention. Sw. Ctr. For Biological Diversity v. Berg, 268 F.3d 810, 818 (9th Cir. 2001).

The Ninth Circuit has adopted a four part test to determine whether an applicant meets the requirements of Rule 24(a). Id. at 817. There is no dispute regarding the Contractors' ability to meet the first three requirements. Resolution depends on the fourth factor--whether the Contractors' interest is adequately represented by existing parties. See id. Here, although close, looking at the matter anew, we conclude that the Contractors' interests are not adequately represented, and as a consequence, that the Contractors should be allowed to intervene.

First, given the Contractors' members' exclusive interest in a majority of the water contracts issued from the State Water Project and Contractors' unique interest in defending the South Delta Improvement Program, there is no assurance that all of the Contractors' arguments will be addressed if they are not included as

parties to this action. Moreover, as a result of its exclusive interest in the State Water Project and the South Delta Improvement Program, there are serious doubts that the existing parties would protect those interests to the same extent, particularly if the parties were to enter into settlement discussions. Thus, because the “burden in showing inadequate representation is minimal,” we conclude that the Contractors should be allowed to intervene. See Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1498 (9th Cir. 1995).

The judgement as to the motion to intervene as a matter of right is, therefore, REVERSED.